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U.S. Citizenship
and Immigration
Services

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FILE: WAC 03 070 50855 Office: CALIFORNIA SERVICE CENTER Date: **DEC 29 2004**

IN RE: Petitioner:
Beneficiary:

PETITION: Immigrant Petition for Other Worker pursuant to § 203(b)(3) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(3).

ON BEHALF OF PETITIONER: SELF-REPRESENTED

INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The Director, California Service Center, denied the preference visa petition that is now before the Administrative Appeals Office on appeal. The appeal will be sustained. The petition will be approved.

A Form G-28, Entry of Appearance, was filed in this matter. On that form, the petitioner's ostensible representative does not indicate that she is an attorney but states that she is the petitioner's "Bonded Immigration Consultant." That ostensible representative's name, however, does not appear on CIS's list of accredited representatives. As such, the file contains no evidence that the petitioner's ostensible representative is qualified and authorized to represent the petitioner. All representations will be considered, but the decision will be furnished only to the petitioner.

The petitioner is a home for the elderly. It seeks to employ the beneficiary permanently in the United States as a nurse assistant. As required by statute, a Form ETA 750, Application for Alien Employment Certification approved by the Department of Labor accompanied the petition. The director determined that the petitioner had not established that it had the continuing ability to pay the beneficiary the proffered wage beginning on the priority date of the visa petition and denied the petition accordingly.

On appeal, the petitioner submits a brief and additional evidence.

Section 203(b)(3)(A)(iii) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A)(iii), provides for granting preference classification to qualified immigrants who are capable, at the time of petitioning for classification under this paragraph, of performing unskilled labor, not of a temporary or seasonal nature for which qualified workers are unavailable.

The regulation at 8 C.F.R. § 204.5(g)(2) states, in pertinent part:

Ability of prospective employer to pay wage. Any petition filed by or for an employment-based immigrant which requires an offer of employment must be accompanied by evidence that the prospective United States employer has the ability to pay the proffered wage. The petitioner must demonstrate this ability at the time the priority date is established and continuing until the beneficiary obtains lawful permanent residence. Evidence of this ability shall be in the form of copies of annual reports, federal tax returns, or audited financial statements.

The petitioner must demonstrate the continuing ability to pay the proffered wage beginning on the priority date, the day the Form ETA 750 was accepted for processing by any office within the employment system of the Department of Labor. See 8 CFR § 204.5(d). Here, the Form ETA 750 was accepted for processing on August 28, 2000. The proffered wage as stated on the Form ETA 750 is \$1,643.20 per month, which equals \$19,718.40 per year.

On the petition, the petitioner stated that it was established during February 1999 and that it employs one worker. On the Form ETA 750B, signed by the beneficiary, the beneficiary claimed to have worked for the petitioner since August 20, 2000. Both the petition and the Form ETA 750 indicate that the petitioner will employ the beneficiary in Salinas, California.

In support of the petition, the petitioner submitted no evidence of its continuing ability to pay the proffered wage beginning on the priority date. Therefore, on June 3, 2003, the California Service Center requested, *inter alia*, evidence pertinent to that ability. Consistent with 8 C.F.R. § 204.5(g)(2) the director requested that the petitioner provide copies of annual reports, federal tax returns, or audited financial statements to show that it had the continuing ability to pay the proffered wage beginning on the priority date. The Service Center also specifically requested copies of the 2000, 2001, and 2003 Form W-2 Wage and Tax Statements showing wage payments the petitioner made to the beneficiary and copies of the beneficiary's check stubs for the previous five months.

In response, the petitioner submitted a copy of the petitioner's 2000, 2001, and 2002 Forms 1065, U.S. Return of Partnership income, the 2000, 2001, and 2002 W-2 forms showing the beneficiary's wages during those years, and two earnings statements also showing wages paid.

The tax returns show that the petitioner reports taxes based on the calendar year. The 2000 return shows that the petitioner reported ordinary income of \$11,105 during that year. Because the petitioner was not required to file a Schedule L, and did not, information pertinent to its net current assets at the end of that year is unavailable.

The 2001 return shows that the petitioner reported ordinary income of \$6,150 during that year. Because the petitioner was not required to file a Schedule L, and did not, information pertinent to its net current assets at the end of that year is unavailable.

The 2002 return shows that the petitioner declared a loss of \$900 during that year. Because the petitioner was not required to file a Schedule L, and did not, information pertinent to its net current assets at the end of that year is unavailable.

With the 2002 return the petitioner's administrator submitted an explanation of the loss. The administrator stated that during that year a renovation of the facility to accommodate non-ambulatory patients resulted in unusually large non-recurring expenses. The administrator further stated that, because the petitioner is now able to accommodate non-ambulatory patients, it anticipates additional income in the future.

The W-2 forms show that the petitioner paid the beneficiary \$3,000 during 2000 and \$9,000 during 2001 and 2002. The wage statements, for the first and second quarters of 2003, show that the petitioner paid the beneficiary \$2,250 during each of those quarters.

The director determined that the evidence submitted did not establish that the petitioner had the continuing ability to pay the proffered wage beginning on the priority date, and, on September 21, 2003, denied the petition.

On appeal, the petitioner argues that its income and expected future income have increased dramatically as a result of accommodating non-ambulatory patients. In addition, the petitioner submits (1) a copy of the partnership agreement pursuant to which it was founded, which identifies the two partners; and (2) copies of the 2000, 2001, and 2002 Form 1040 U.S. Individual Income Tax Returns of both partners.

The Form 1040 returns of one of those partners¹, Irene Laurel, show adjusted gross income of \$96,793, \$71,534, and \$66,414 during 2000, 2001, and 2002, respectively. The Form 1040 returns of the other partner², [REDACTED], show adjusted gross income of \$66,414, \$49,552, and \$45,567 during those same years.

In determining the petitioner's ability to pay the proffered wage during a given period, CIS will examine whether the petitioner employed the beneficiary during that period. If the petitioner establishes by documentary evidence that it employed the beneficiary at a salary equal to or greater than the proffered wage, the evidence will be considered *prima facie* proof of the petitioner's ability to pay the proffered wage. In the instant case, the petitioner established that it employed and paid the beneficiary \$3,000 during 2000, \$9,000 during 2001, and \$9,000 during 2002. The petitioner also submitted wage statements showing that it paid the beneficiary \$2,250 during each of the first two quarters of 2003, an amount consistent with \$9,000 per year.

If the petitioner does not establish that it employed and paid the beneficiary an amount at least equal to the proffered wage during that period, the AAO will, in addition, examine the net income figure reflected on the petitioner's federal income tax return, without consideration of depreciation or other expenses. CIS may rely on federal income tax returns to assess a petitioner's ability to pay a proffered wage. *Elatos Restaurant Corp. v. Sava*, 632 F.Supp. 1049, 1054 (S.D.N.Y. 1986) (citing *Tongatapu Woodcraft Hawaii, Ltd. v. Feldman*, 736 F.2d 1305 (9th Cir. 1984)); see also *Chi-Feng Chang v. Thornburgh*, 719 F.Supp. 532 (N.D. Texas 1989); *K.C.P. Food Co., Inc. v. Sava*, 623 F.Supp. 1080 (S.D.N.Y. 1985); *Ubeda v. Palmer*, 539 F.Supp. 647 (N.D. Ill. 1982), *aff'd*, 703 F.2d 571 (7th Cir. 1983).

Showing that the petitioner's gross receipts exceeded the proffered wage is insufficient. Similarly, showing that the petitioner paid wages in excess of the proffered wage is insufficient. In *K.C.P. Food Co., Inc. v. Sava*, 623 F. Supp. at 1084, the court held that the Immigration and Naturalization Service, now CIS, had properly relied on the petitioner's net income figure, as stated on the petitioner's income tax returns, rather than the petitioner's gross income. The court specifically rejected the argument that CIS should have considered income before expenses were paid rather than net income. Finally, no precedent exists that would allow the petitioner to add back to net cash the depreciation expense charged for the year. *Chi-Feng Chang* at 537. See also *Elatos Restaurant*, 623 F. Supp. at 1054.

The petitioner's net income, however, is not the only statistic that may be used to show the petitioner's ability to pay the proffered wage. If the petitioner's net income, if any, during a given period, added to the wages paid to the beneficiary during the period, if any, do not equal the amount of the proffered wage or more, the AAO will review the petitioner's assets as an alternative method of demonstrating the ability to pay the proffered wage.

The petitioner's total assets, however, are not available to pay the proffered wage. The petitioner's total assets include those assets the petitioner uses in its business, which will not, in the ordinary course of business, be converted to cash, and will not, therefore, become funds available to pay the proffered wage. Only the petitioner's current assets, those expected to be converted into cash within a year, may be considered. Further, the petitioner's current assets cannot be viewed as available to pay wages without reference to the petitioner's current liabilities, those liabilities projected to be paid within a year. CIS will consider the petitioner's net current assets, its current assets net of its current liabilities, in the determination

¹ The returns are actually the joint returns of that partner and her husband.

² Also joint returns.

of the petitioner's ability to pay the proffered wage. In this case, because the petitioner did not submit a completed Schedule L with any of its tax returns, information pertinent to its year-end net current assets is unavailable.

The partnership agreement submitted shows, however, that the petitioner is a general partnership. Each of the partners in a general partnership, in this case both partners, is jointly and severally responsible for the partnership's debts and obligations. Because each partner is obliged to satisfy those debts and obligations, as necessary, out of his or her own income and assets, the income and assets of each partner is correctly included in the determination of a general partnership petitioner's ability to pay the proffered wage. The petitioner's owner is obliged, however, to demonstrate that he or she could have paid the proffered wage out of his adjusted gross income and supported himself or herself, and his or her family, on the remaining funds.

The proffered wage is \$19,718.40 per year. The priority date is August 28, 2000.

During 2000 the petitioner paid the beneficiary \$3,000. That amount is \$16,718.40 less than the proffered wage. The petitioner declared income of \$11,105. That amount was subsumed into the partners' adjusted gross incomes. The partners had adjusted gross incomes of \$96,793 and \$66,414 during that year. The partners appear to have been able to pay the \$16,718.40 balance of the proffered wage and still support their families³ during 2000.

During 2001 the petitioner paid the beneficiary \$9,000, which is 10,718.40 less than the proffered wage. The petitioner's ordinary income of \$6,150 during that year was subsumed into the adjusted gross income of its partners. During that year the partners had adjusted gross incomes of \$71,534 and \$49,552. The partners appear to have been able to pay the proffered wage of \$10,718.40 and still support their families during 2001.

During 2002 the petitioner paid the beneficiary \$9,000. That amount is 10,718.40 less than the proffered wage. The petitioner's loss of \$900 during that year was subsumed into the adjusted gross income of its partners. During that year the partners had adjusted gross incomes of \$66,414 and \$45,567. The partners appear to have been able to pay the proffered wage of \$10,718.40 balance of the proffered wage and still supported their families during 2002.

The petitioner has demonstrated the ability to pay the proffered wage during each of the salient years. Therefore the petitioner has shown its continuing ability to pay the proffered wage beginning on the priority date.

The burden of proof in these proceedings rests solely upon the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has met that burden.

ORDER: The appeal sustained. The petition is approved.

³ During each of the salient years each partner's household consisted of herself, her spouse, and one other dependent, except that during 2002 Mr. and Mrs. Laurel had no dependents.